In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE MILLIKEN IMPRINTING COMPANY. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

THE QUESTION OF JURISDICTION.

Counsel for the appellee relies on the rule laid down in Pomeroy on Remedies, that an action to reform an instrument and to enforce the same as reformed states but one cause of action, in support of his contention that the Court of Claims had jurisdiction to reform the contract in this case. It is, however, but a rule of procedure pertaining to courts of equity, and based upon the principle that equity demands that the court, having assumed jurisdiction for one purpose, should retain jurisdiction of the case for all purposes in order that complete justice may be done between the parties. (4 Greene (Ia.), 229, cited in brief of appellee.) Such

a rule of procedure can not do away with the *fact* that the demand for reformation of the contract is equitable, and that the demand for recovery of money is legal (*Harrison* v. *Juneau Bank*, 17 Wis., 350), and the statement of that rule does not seem to shed light upon the vital inquiry in this case, which is whether the Court of Claims is empowered to sit as a court of equity to reform a contract. It is conceded that the procedure was correct if the court had jurisdiction to proceed.

THE QUESTION OF MISTAKE.

The brief for appellee, upon the question of mistake here involved, assumes an analogy which does not exist between the facts in this case and those in the cases cited by it. In every case thus relied upon there was a clear undisputed contract contained in written communications between the parties, made prior to the drawing and execution of the formal contract, and containing provisions which were omitted from the formal contract. From this unquestioned contract of the parties, established beyond reasonable doubt, the court was able to say without hesitation that the formal contract was defective and to reform the same. In this case, as has already been pointed out, there was no such contract made prior to the execution of the formal contract by the claimant and the Commissioner. But, conceding for the sake of argument that such an agreement is to be found in the letter of the Commissioner written April 25, 1899, the written application of the claimant for a renewal of its old contract made in response to that letter and the acceptance of such application by

the Commissioner—that therein is contained the contract between the parties, the question at once arises: What is that contract? And reference to the evidence at once demonstrates that there is an irreconcilable difference of understanding between the claimant and the Commissioner of Internal Revenue; who represented the Government, upon the subject of the letter of the Commissioner relied upon by the claimant. The claimant asserts that it understood from that letter that the new contract would contain a provision binding the United States not to let one of the new contracts to any party that did not have a contract with the Government for imprinting revenue stamps at the time that the letter was written. On the other hand, Mr. Johnson, chief of the stamp division in the office of the Commissioner, with whom the Commissioner had conferred about the terms and conditions of the new contracts (A. 11, Rec., p. 51), and with whom the Commissioner had agreed as to the changes to be made in them (A. 1, p. 53), and who prepared the draft of the same by direction of the Commissioner, testifies that there was no intention on the part of the Bureau of Internal Revenue or the Treasury Department, so far as he knew, to put any such provision into the contracts; that it was not put into them and that such omission was not the result of a mistake on his part. (Rec., p. 52.) Certainly the claimant ought to accept as conclusive this statement made by an official upon whom its president and attorney, Mr. David Milliken, placed the implicit, not to say child-like, reliance that he has testified to.

The testimony of Johnson on this point is corroborated by his further testimony that the blank contracts prepared by him and containing the two changes which had been discussed and agreed upon between the Commissioner and himself were submitted by him to the Commissioner (Rec., A. 15 and 16, p. 55), who filled them up, omitting the signatures, and forwarded them to the several parties who had signified their willingness to sign them for the next year. (Rec., p. 51.) And he adds that the Commissioner must have read the contract, because the proposed changes were considered important in the office, and it was the custom of the Commissioner to read important papers which he had to sign. (Rec., pp. 53–55.) The reasonable presumption must also be that he performed this plain duty. Here, then, we have positive and unmistakable evidence that the Commissioner never intended that the new contracts should contain the provision which the claimant asserts it supposed it would contain, and that the supposition of the claimant in this regard was based upon a misunderstanding of the purport of the letter of the Commissioner. That is to say, instead of there being a clear understanding and agreement between the parties upon this point, there was a positive misunderstanding between them on the subject—an utter failure of their minds to meet as to the full purpose of the Commissioner's letter. This disposes of the question, for surely the court could not reform the contract that the parties have executed without clear and satisfactory proof of the real contract. Indeed,

any *reasonable doubt* on that score precludes such action. To quote from one of the authorities cited by the appellee:

> Of course the presumption in favor of the written over the spoken agreement is almost resistless, and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied. But in the case at bar the defendant voluntarily lifts the burden from the plaintiffs and upon the pleadings admits that the deliverd policy is materially variant from the precedent written draft agreed upon. (*Palmer* v. *Hartford Insurance Co.*, 54 Conn., 501.)

ERRORS OF BRIEF FOR THE APPELLEE.

On page 10 of appellee's brief it is stated that the alleged mistake in the contract of the claimant was admitted to the claimant by the Commissioner and the Secretary of the Treasury—referring to "page 52." This reference is apparently to the printed record in the Court of Claims and the correct reference to the Transcript of Record is pages 42 and 43. It contains no such statement by the Commissioner nor is any such testimony to be found in the case.

On page 11 it is asserted that the claimant had an interview with the Commissioner and the Secretary of the Treasury who stated to it that the Commissioner's letter of April 25, 1899, contained the agreement; that the contract with the American Imprinting Company had been granted through inadvertence and that it was a violation of appellee's contract ("pp. 52 and 53").

The reference should be, Rec., pp. 42 and 43. There is no such testimony in the case as to the Commissioner.

It is stated in the brief of appellee that the contract of claimant was approved by the Secretary of the Treasury. The contract is set forth in the Record, pages 3–6, and bears no such approval.

On page 12 occurs the following assertion: "But there is no denial that there was a mistake in the contract in the suit at bar." It has already been pointed out in this brief that Mr. Johnson, who prepared the contract after consultation with the Commissioner with respect to the changes to be made in it from the old contract, denies any such mistake unqualifiedly, and that the acts of the Commissioner himself with reference to the contract constitute a similar denial. Being dead he could not be produced as a witness to this fact.

Counsel for the appellee speak of the salaries that it was required by the contract to pay to the supervising agents of the Government as the consideration of its contract. The contract itself expressly provides that the consideration to be received by the claimant is such compensation as it may get from the public for imprinting stamps for them. (Rec., p. 4.)

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